Supreme Court, U.S.
FILED
FEB 22 2001
CLERK

(6)

No. 00-1238

In the
Supreme Court of the United States

October Term, 2000

BOISE CASCADE CORPORATION, a Delaware corporation,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

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AMICUS CURIAE BRIEF OF APA—THE ENGINEERED WOOD ASSOCIATION IN SUPPORT OF PETITIONER

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18 pp

QUESTION PRESENTED

Whether a state regulation that requires private landowners to reserve significant acreage as a wildlife habitat for certain species necessitates compensation under the Fifth and Fourteenth Amendments.

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INTEREST OF *AMICUS CURIAE*

APA—The Engineered Wood Association ("APA" or "*amicus*") is a nonprofit trade association whose members produce a variety of engineered wood products, including plywood, oriented strand board, glued laminated timber, composite panels, wood I-joists, and laminated veneer lumber.[1] APA-member mills produce approximately 75 percent of the structural wood panel products manufactured in North America.

APA members depend on a readily available supply of harvested timber, much of it from privately owned lands. Environmental regulations that protect species habitat exact enormous costs on private landowners if the government does not compensate landowners—pursuant to the Fifth and Fourteenth Amendments—for their losses resulting from their inability to harvest timber. Those costs, if absorbed through price increases, are then passed on to APA members. *Amicus* is therefore very interested in the fair and equitable distribution of the costs associated with species habitat protection. Although APA supports the public goals behind

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[1] *Amicus* has filed with the Clerk of this Court letters from all parties reflecting their consent to the filing of this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part; and that no person other than

species preservation, it believes that the United States Constitution requires that the costs involved in that endeavor should rest "upon the public at large, rather than on fortuitously accountable individual landowners." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 735-36 (1995) (Scalia, J., dissenting).

STATEMENT

Amicus adopts Petitioner's statement of the case. Oregon, like many other Western states, has enacted a Forest Practices Act governing the harvesting of timber on private and State-owned land. OR. REV. STAT. §§ 527.610 *et seq.* (1999). Under that Act, the State Board of Forestry has the authority to adopt rules related to forest practice standards, reforestation procedures, pollution control, water quality, scenic areas, and the protection of fish and wildlife resources. OR. REV. STAT. § 527.714 - .770 (1999).

Acting under the authority of the Forest Practices Act, the Board of Forestry adopted a regulation to protect the northern spotted owl. In the event that a proposed logging operation would conflict with a spotted owl nesting site, the operator must submit a written plan to the State Forester that includes "[a] 70 acre area of suitable spotted owl habitat

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amicus curiae contributed monetarily to the preparation and submission of this brief.

encompassing the nest site, to be maintained as suitable spotted owl habitat." OR. ADMIN. R. 629-665-0210(1)(a) (2000), Pet. App. J.[2] The subject regulation does not provide a variance procedure through which a landowner may attempt to reduce the number of acres that must be left intact. However, the Board of Forestry *may* consider an exception to the required habitat conservation if the operator has obtained an incidental take permit ("ITP") under Section 10 of the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1539(a) (2000). OR. ADMIN. R. 629-665-0210(5) (2000).

To place the ITP in the context of the entire ESA, one should understand that Section 9 of the ESA makes it unlawful for any "person" to "take" any endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B) (2000). The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2000).[3] Persons

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[2] At the time that Petitioner sought the Board of Forestry's approval to harvest its timber, the effectively identical rule was promulgated at OR. ADMIN. R. 629-24-809. *Boise Cascade Corp. v. State of Oregon*, 991 P.2d 563, 564 n.1 (Or. Ct. App. 1999), Pet. App. A.

[3] "Take" can also be accomplished through habitat modification, without any actual loss of species life. *See* 50 C.F.R. § 17.3 (defining the "harm" element of take to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering").

who believe that their actions may cause "take" of a given listed species can seek an ITP under Section 10. However, it is "not mandatory" to seek an ITP. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000). Further, states themselves are not obligated to enforce the ESA's provisions. 16 U.S.C. § 1540 (2000) (delegating enforcement authority to the U.S. Fish & Wildlife Service, the Justice Department, and to individuals bringing citizen suits). The ESA could not compel states to enforce its provisions in any event without running afoul of the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 933 (1997).

As a result of the subject regulation, Petitioner was prevented from harvesting its timber on a 56-acre area for a period of nearly five years, which caused Petitioner to suffer a loss of $1,820,059. Pet. at 9-10.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Decision That Petitioner Failed to Establish a "Physical" Taking Is a Misinterpretation of the Relevant Decisions of This Court

The Oregon Court of Appeals ruled that the trial court erred when it denied Respondent's motion to strike Petitioner's allegations that the subject regulation effected a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See Boise Cascade Corp.*

v. State, 991 P.2d 563, 570 (Or. Ct. App.) (1999), Pet. App. A. In so ruling, the Court of Appeals focused on language from *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), cited in *Loretto*, that stated "'where real estate is actually invaded by *superinduced* additions of water, earth, sand or other material, or by having any *artificial* structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking.'" 991 P.2d at 569 (quoting *Pumpelly*, 80 U.S. (13 Wall.) at 181 (emphasis supplied by Court of Appeals)). The Court of Appeals therefore appeared to assume that the test for a physical taking is whether the government itself introduces or causes the physical invasion onto the owner's property:

> The state did not cause or induce the spotted owls to breed on plaintiff's property. The state simply regulated plaintiff's use of the property based on the presence of the spotted owls there. Although plaintiffs [*sic*] have stated a claim for a regulatory taking, they [*sic*] have not stated a claim for a "physical occupation" taking under *Loretto*.

991 P.2d at 570.

The Court of Appeals' interpretation fundamentally misreads this Court's physical taking jurisprudence and contradicts its precedents. The fact that the state did not place the owls on Petitioner's property is not determinative of whether a taking occurred; the taking was instead

accomplished by the state's requirement that Petitioner suffer the owls' presence on its property, without having any opportunity to exclude them.[4] "[A] permanent physical occupation *authorized by the government* is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426 (emphasis added) and 432 n.9 ("A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant."). This Court reiterated the importance of this principle in *Yee v. City of Escondido*, 503 U.S. 519 (1992), where it noted that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." 503 U.S. at 527 (emphasis in original).

The subject regulation definitely requires Petitioner to submit to the physical occupation of its land by the owls. Although the state did not place the owls onto Petitioner's property, it did grant the owls a special status that elevated them above any other animal (or human, for that matter) that might be "found" on the property. For example, assume that Petitioner's trees were being damaged by a family of beavers living on Petitioner's property. The beavers, like the owls, are

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[4] Under the subject regulation, Petitioner was required to prevent disturbances that "cause owls to flush from the nesting site." OR. ADMIN. R. 629-665-0210(1)(b), Pet. App. J.

a naturally occurring condition that may be on the property and not placed there by the state. However, unlike the owls, Petitioner can relocate the beavers to another site where they will not affect Petitioner's property. The subject regulation strips Petitioner of the right to exclude, which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); *cf. Yee*, 503 U.S. at 528 (noting that the government did not remove right to exclude from petitioners because their tenants "were invited by petitioners, not forced upon them by the government").

The state has an obviously legitimate interest in taking steps to protect endangered species. However, the costs of that protection should not fall entirely on private landowners' shoulders. *Dolan*, 512 U.S. at 384 ("One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). That reasoning is particularly strong in the case of species habitat protection, given that—as of 1993—nearly 80 percent of all ESA endangered or threatened species lived entirely or partially on private lands. *See* U.S. GEN. ACCOUNTING

OFFICE, ENDANGERED SPECIES: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 4-6 (1994). To require private landowners—who, by having not previously harvested their timber, have actually contributed to species preservation more than most[5]—to subsequently bear the sole costs of state-ordered habitat preservation when they do seek to reap the economic benefits of their property, is beyond ironic; it is fundamentally unfair. Granting the petition will allow this Court to clarify its *Loretto* takings jurisprudence in the context of government-compelled habitat preservation.

Protecting endangered species is a laudable goal; however, because that endeavor benefits the general public, its costs should be borne by the public as well. The subject regulation requires Petitioner to suffer the owls' physical invasion of its property. The Court of Appeals therefore erred when it ruled that Petitioner failed to state a claim of a physical taking under *Loretto*. This Court should grant the petition to correct the Court of Appeals' error, and to provide

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[5] As of 1995, federal timberlands represented almost half (47.8 percent) of the total timberlands in Washington, Oregon, and California. U.S. GEN. ACCOUNTING OFFICE, PRIVATE TIMBERLANDS: PRIVATE TIMBER HARVESTS NOT LIKELY TO REPLACE DECLINING FEDERAL HARVESTS 2 (1995). Up until 1991, when federal courts began imposing injunctions on federal timber sales, federal and other publicly owned timber was being harvested at a significant rate. In 1989, shortly before the injunctions went into effect, over 8 billion board feet of timber was harvested from public lands in Washington, Oregon, and California. *Id.* at 5.

guidance regarding the appropriate balance that should be struck between public and private interests when private landowners are required to carry out public goals.

B. The Court of Appeals Incorrectly Ruled That This Matter Was Not Ripe

The Court of Appeals ruled that this action was unripe because Petitioner failed to seek an ITP pursuant to Section 10 of the ESA. 991 P.2d at 572, Pet. App. A. Not only does this ruling conflict with this Court's precedents, it gives the federal government undue authority over a state regulatory system, and further skews the already-lengthy process through which property owners attempt to determine their rights toward less, not more, finality.

A claim that governmental regulations effect a taking of property "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). That criterion was met in this case when the Oregon Board of Forestry affirmed the State Forester's denial of Petitioner's amended plan to harvest the subject timber.[6] The fact that Petitioner did not

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[6] Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed that agency's decision. Pet. App. G and H.

apply for an ITP has no bearing on the finality of the Board of Forestry's decision.

Petitioner is in a fundamentally different situation than the one presented in *Williamson County*, where the petitioner was a real estate developer who did not seek any variances whatsoever from the local agency charged with administering property development, notwithstanding the fact that the regulations were structured in such a way that preliminary development plans would nearly always be disapproved pending further variance application procedures. 473 U.S. at 190. Unlike the planning commission in *Williamson County*, the Board of Forestry is not a "singularly flexible institution[]" that, although it "take[s] with one hand [it] may give back with the other." *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986). The subject regulation in this case, in contrast, has no "variance" procedure at all. Indeed, the only way that the Board of Forestry could have granted a "variance" from the requirement to preserve a "70 acre area of suitable spotted owl habitat encompassing the nest site," OR. ADMIN. R. 629-665-0210(1)(a), Pet. App. J, was if Petitioner had obtained an ITP, although, as Petitioner points out and the Court of Appeals did not dispute, the procurement of that permit by no means guaranteed that Petitioner would have received a

"variance." 991 P.2d at 572, Pet. App. A. Indeed, the Board of Forestry has the ability to completely disregard an ITP when deciding whether to approve an operator's harvest plan.

However, the Court of Appeals inappropriately ended the inquiry there, because even if Petitioner had applied for—and received—an ITP, the outcome for Petitioner would have been no different. Because incidental take permits must include habitat conservation plans (16 U.S.C. § 1539(a)(2)(B)), Petitioner in all likelihood would have been obligated to preserve virtually the same 70 acres in accordance with the incidental take permit,[7] rendering that portion of the property nearly valueless and almost entirely interfering with Petitioner's "reasonable investment-backed expectations." *Williamson County*, 473 U.S. at 191 (discussing relevant factors to consider when determining whether a taking has occurred); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The typical ripeness concern is that "[t]hose factors simply cannot be evaluated until the administrative agency has arrived at a

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[7] That scenario actually presents an even more pernicious taking than the one this Court must consider: a taking with no "taker" against whom the property owner can seek redress. Under that example, the State could argue that it is not the taker because the ITP's habitat preservation requirements are the cause of the "take." On the other hand, the federal government could claim not to be the taker because the property owner voluntarily applied for the ITP. Trapped in a vicious circle between two entirely different levels of government, the property owner would be left with no recourse from either.

final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. In this case, however, it is clear that—regardless of whether it obtained an ITP—Petitioner nevertheless would have been deprived of the full value of its reasonable investment-backed expectations. Petitioner's taking claim is therefore ripe, notwithstanding Petitioner's failure to seek an incidental take permit.

Further, none of this Court's ripeness precedents indicate that a taking claimant must seek a variance from an entirely different government agency than the one that is the final decisionmaker. *Cf. Williamson County*, 473 U.S. at 193 (noting that land developer did not need to appeal rejection of its preliminary plat to a different zoning board because that board had no right to participate in the decisionmaking process). By denying Petitioner's request to harvest its timber, the Board of Forestry "arrived at a definitive position on the issue that inflict[ed] an actual, concrete injury." *Id.* That is all that Petitioner needed to demonstrate to establish that this matter was ripe.

CONCLUSION

For the foregoing reasons, APA urges the Court to grant the petition.

Respectfully submitted,

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February 2001